No. 78-1677

# In the Supreme Court of the United States

OCTOBER TERM, 1978

PACIFIC LEGAL FOUNDATION, ET AL.,
PETITIONERS

*v.*

DEPARTMENT OF TRANSPORTATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 593 F.2d 1338.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 1, 1979. A petition for rehearing was denied on March 5, 1979. The

petition for a writ of certiorari was filed on May 4, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Department of Transportation's exclusion of an adverse internal agency memorandum from the administrative record invalidated its rulemaking proceedings.

2. Whether the Secretary of Transportation adequately considered "public reaction" in mandating a passive restraint system for passenger automobiles.

## STATEMENT

1. Section 103(a) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392(a) ("the Act"), directs the Secretary of Transportation to establish "appropriate Federal Motor vehicle safety standards." Federal Motor Vehicle Standard 208, now codified at 49 C.F.R. 571.208, governs the performance requirements for the protection of vehicle occupants in crashes. The initial version of Standard 208 required manufacturers to install seat belts in all vehicles in order to protect passengers from the often fatal effects of the so-called "second collision" (between passenger and vehicle interior) that invariably follows the initial collision between the vehicle and another object. See 32 Fed. Reg. 2408, 2415 (1967). The Department of Transportation ("DOT") soon became aware, however, that although seat belts were effective when used, they would not reduce traffic injuries to acceptable levels because passengers far too frequently failed to use them.



Accordingly, in July 1969, DOT issued an advanced notice of proposed rulemaking, declaring its intention to require the prompt development of "passive restraints," that is, protective restraint systems, such as airbags or passive seat belts,[1] that do not require affirmative passenger action. 34 Fed. Reg. 11148 (1969). In 1972, after extensive administrative proceedings, DOT adopted a rule specifying a three-step plan for establishing a complete passive restraint system.[2] Several car manufacturers immediately sought judicial review of this rule, and in December 1972 the United States Court of Appeals for the Sixth Circuit held a portion of the rule invalid. *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659

[1] Airbags are inflatable cushions stored under the vehicle dashboard or in the steering wheel which, when triggered by the deceleration forces associated with frontal collisions, fill with air to protect the rider from collision with the car's interior. Passive belts are similar to existing shoulder belts except that they automatically deploy around front seat occupants as they enter the car and close the door (Pet. App. 4-5).

[2] Between January 1972 and August 1973, new cars would have to be equipped with lap and shoulder belts for front seats and lap belts at all other seating positions. From August 1973 to August 1975, new cars would have to provide at least lap and shoulder belts for front seat occupants with an "ignition interlock" system that would prevent the car from starting while belts were unconnected. After August 1975, new cars would have to contain passive restraints for all passengers. 37 Fed. Reg. 3911 (1972).

(1972). Although the court held that the decision to require passive restraints was supported by substantial evidence and constituted a reasonable exercise of agency discretion (*id.* at 674-675), it concluded that the performance test specifications did not comply with the Act's requirement that the standards be objective, because the specifications for test dummies were insufficiently uniform to ensure repeatable results. *Id.* at 675-680; see also 15 U.S.C. 1392(a).[3]

Despite this setback, DOT continued to study the desirability of a mandatory passive restraint standard, and in June 1976, then Secretary of Transportation William T. Coleman announced the beginning of further rulemaking proceedings on the matter. After hearing public testimony and receiving written comments, Secretary Coleman concluded that passive restraints were technologically and economically feasible and "would provide substantially increased protection to the public in traffic accidents" (Pet. App. 7; J.A. 65).[4] However, based upon the experience with the ignition interlock system, Secretary Coleman believed that a negative public reaction to passive restraints was possible, and he therefore chose not to order their immediate introduction. Instead, he and the automobile manufacturers agreed to cooperate in a demonstration project to exhibit the effectiveness of passive restraints (*ibid.*).

[3] Although the *Chrysler* decision indefinitely delayed the introduction of mandatory passive restraints, the other portions of the 1972 standard (see note 1, *supra*), including the ignition interlock system for post-August 1973 cars, were unaffected. See *Ford Motor Co.* v. *National Highway Traffic Safety Administration*, 473 F.2d 1241 (6th Cir. 1973). In the fall of 1974, however, Congress amended the Act to preclude mandatory ignition interlock systems. Pub. L. No. 93-492, Title I, Section 109, 88 Stat. 1482, 15 U.S.C. 1410b.

[4] "J.A." refers to the joint appendix in the court of appeals.



2. A few months later, the new Secretary of Transportation, Brock Adams, reopened the rulemaking proceeding. See 42 Fed. Reg. 15935 (1977). Following another round of public hearings and written comments, Secretary Adams ordered the promulgation of the passive restraint standard at issue here. This rule requires that manufacturers install passive restraints in all new passenger cars according to the following schedule: by September 1, 1981, for passenger cars with wheelbases over 114 inches; by September 1, 1983, for cars with wheelbases over 100 inches; and by September 1, 1983, for all other cars. The only commercially available passive restraint systems currently capable of meeting these requirements are airbags and passive belts. See note 1, *supra.*

Based upon his examination of the record, Secretary Adams concluded that the mandatory installation of passive restraints was the most reasonable approach to the occupant crash protection problem. Although Secretary Adams agreed with Secretary Coleman's findings that passive restraints were technically and economically feasible and that such devices could prevent approximately 9,000 deaths and more than 100,000 injuries each year, he rejected his predecessor's reason for delaying implementation of

the standard (Pet. App. 7-8, 51-70). In Secretary Adams' judgment, the experience with the ignition interlock system, upon which DOT's prior policy was based, was not an accurate gauge of the likely public reaction to passive restraints, because passive restraint systems, unlike the interlock system, require no affirmative passenger action and thus do not interfere with the public's driving habits (Pet. App. 51). Secretary Adams also observed that "public acceptance or rejection of passive restraints is not one of the statutory criteria which [DOT] is charged by law to apply in establishing standards" (*ibid.*).

3. Petitioners filed a petition for review in the court of appeals (see Section 105(a)(1), 15 U.S.C. 1394(a)(1)), claiming that Secretary Adams' order mandating passive restraints in passenger cars was arbitrary, capricious and contrary to law.[5] The court of appeals rejected petitioners' contentions, finding that the Secretary had properly relied upon a mix of test data and field experience in determining the reliability and effectiveness of passive restraint systems.

[5] Petitioners' case was subsequently consolidated with a petition for review filed by Ralph Nader and Public Citizen, which challenged only the implementation schedule for the passive restraint standard. The Ford Motor Company intervened in that action to defend the implementation schedule. The court of appeals rejected the challenge to the implementation schedule (Pet. App. 20-24), and that ruling is not before this Court. None of the car manufacturers sought review of the current passive restraint standard, although the manufacturers had successfully attacked the prior passive restraint standard. See *Chrysler Corp.* v. *Department of Transportation, supra.*



The court concluded that the Secretary had not abused his discretion in finding that the benefits of passive restraints substantially outweigh any potential dangers of such systems (Pet. App. 11-20). Furthermore, although disagreeing with the Secretary's interpretation of the Act regarding the necessity to consider public reaction, the court ruled that "the Secretary did take public reaction into account and satisfactorily explained his conclusion that widespread public resistance to passive restraints is unlikely" (*id.* at 15).

Prior to oral argument in the court of appeals, petitioners, pursuant to a request under the Freedom of Information Act (5 U.S.C. 552), obtained a copy of a 1976 study prepared by a DOT employee, Dr. Charles Kahane. This internal agency memorandum purported to analyze the then publicly available information concerning the road experience of airbag equipped cars [6] and drew certain negative conclusions as to the validity of the agency's effectiveness estimates for the airbag system. Petitioners moved to supplement the administrative record with this study. Although the Secretary disputed petitioners' assertion that the memorandum, which dealt with matters already of public record, had been improperly excluded from the administrative proceedings, he interposed no objection to having the study made part of that record. In addition, the Secretary moved to add

[6] Some 12,000 airbag equipped cars have been manufactured, approximately 10,000 of which have been sold to the public; the others are special test vehicles used only in government and business fleets (Pet. App. 13).

to the record a more recent study of the road experience of airbag cars which supported DOT's estimates concerning the utility of airbags.[7] The court of appeals granted the motions, and both studies were before the court when it issued its decision.

## ARGUMENT

Petitioners do not directly challenge the Secretary's conclusions, affirmed by the court below, that the passive restraint standard is technologically and economically feasible and advances the cause of motor vehicle safety. Rather, petitioners suggest that review by this Court is appropriate because (1) DOT's alleged concealment of "data" invalidated the proceedings culminating in the issuance of the passive restraint standard and (2) DOT failed adequately to consider public reaction in adopting the standard. There is no merit to either contention, and further review of these fact-bound questions is unwarranted.

1. Petitioners contend (Pet. 9-13) that DOT concealed "data" in promulgating the passive restraint standard and that therefore the standard is invalid. But the data in question—facts concerning the actual road experience of airbag equipped cars—were part of the administrative record available to the public and considered by the Secretary. DOT constantly monitors and studies all accidents involving airbag equipped cars and has compiled a number of public

[7] This study had been prepared in accordance with the Secretary's continuing obligation to monitor the effectiveness of safety standards. See Pet. App. 13 n.45.



reports evaluating the information thus obtained.[8] Secretary Adams addressed the road experience data in announcing the passive restraint standard (Pet. App. 56-60), and the agency discussed the data in detail in its separate "Explanation of Rule Making" (J.A. 263-265). In short, all aspects of the actual, albeit limited, experience with airbags were explored and considered. There is therefore no factual basis for petitioners' claim that crucial information was withheld from the agency proceedings.

DOT did not include the Kahane memorandum in the administrative record, but that memorandum did not contain any information not otherwise part of the public record. The Kahane study was nothing more than an analysis of the underlying actual road experience data already included in the record. In an informal rulemaking proceeding, the administrative record is comprised of the public comments, any hearings that have been held, the basis of the agency decision (including any official statements by the agency accompanying adoption of the rule), and the rule or order itself. See *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir.

[8] Executive and Tabular Summary of Air Bag Field Experience, Vol. 1. no. 1 (April 1977) (J.A. 589-762); NHTSA, A Summary of Air Bag Field Experience 1973-1977 (October 4, 1977) (J.A. 1153-54); Insurance Institute for Highway Safety, Comparative Performance of Air Bags and Lap/Shoulder Belts in Real World Crashes (May 27, 1977) (J.A. 917-939); NHTSA, Assessments of Air Bag Effectiveness Based on Field Experience (April 15, 1977) (J.A. 763-805).

1975); 28 U.S.C. 2112(b); 5 U.S.C. 706. Petitioners cite no authority (and we are aware of none)[9] suggesting that an internal agency memorandum based on evidence in the public record must also be included in the administrative record, especially when the agency has rejected the methodology and conclusions of the memorandum.[10]

[9] Petitioners rely on *National Courier Ass'n* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975). See Pet. 12 n.6. But that case merely indicates that internal memoranda that are either purely factual in nature or adopted by the agency as the basis of its decision might in appropriate circumstances be included in the administrative record. 516 F.2d at 1241-1242. Here, of course, the facts were in the public record, and the agency rejected rather than adopted the memorandum in question.

Indeed, this kind of internal memorandum is ordinarily exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(5); *EPA* v. *Mink*, 410 U.S. 73, 85-94 (1973); *National Courier Ass'n* v. *Board of Governors of the Federal Reserve System, supra.* The Secretary nonetheless exercised his discretion and released the Kahane memorandum to avoid raising any question in the public's mind regarding the safety of the airbag system.

[10] Although Dr. Kahane did not dispute that the road data supported the agency's conclusion that airbag systems would generally decrease injuries, he nonetheless concluded that the inordinate number of fatalities in the known crashes undermined the agency's estimates regarding the overall effectiveness of the airbags. However, as both the agency and the court of appeals noted, at least three of the four recorded fatalities involved extraordinary circumstances for which the airbag provides no protection (Pet. App. 14 n.49; J.A. 263, 1153-1154). More important, the sampling data relied on by Dr. Kahane were simply too small to draw any reliable conclusions. As the court of appeals stated (Pet. App. 14 n.48):

> The data are drawn from over 200 crashes. * * * A leading study of seatbelt effectiveness, in contrast, analyzed over 15,000 towaways. * * * With a small sample, statistical projections of probabilities are less reliable.



Moreover, petitioners' suggestion (Pet. 12-13) that the court of appeals "fail[ed] to even consider DOT's concealment of data" is unfounded. To the contrary, the court, after granting petitioners' motion to add the Kahane study to the record, cited the report (Pet. App. 14 n.47) and remarked that "in view of the relatively small sample involved, and the extraordinary nature of several of the accidents, this variation [between DOT's estimates and actual road figures] does not undermine the agency's conclusion that airbags are effective" (Pet. App. 14; footnotes omitted).[11] We further note that it was not until the rehearing stage in the court of appeals that petitioners first argued that the alleged "concealment" of the Kahane memorandum invalidated the passive restraint standard.

2. Petitioners also contend (Pet. 13-17) that the court of appeals erroneously concluded that the Secretary adequately considered "public reaction" in re-

[11] Petitioners also argue (Pet. 10-11 n.4) that insofar as the court of appeals relied on the Secretary's September 1978 study of actual airbag experience "its action is inconsistent with the rule that a court review the record which was before the decision maker, and not a *post hoc* record * * *." However, the court of appeals cited the 1978 study only to support undisputed factual statements found elsewhere in the record. Compare Pet. App. 14 with J.A. 263, 1153-1154. Furthermore, Section 105(a)(2) of the Act, 15 U.S.C. 1394(a)(2), allows the administrative record to be supplemented pending appellate review, in the court of appeals' discretion.

quiring passive restraint systems in passenger cars. "Public reaction" is not a statutorily mandated factor (such as safety) that the Secretary must consider before establishing motor vehicle safety standards. See Section 103(a) and (f), 15 U.S.C. 1392(a) and (f). But insofar as the Act's requirement that safety standards be "practicable" suggests that the Secretary should give public reaction some weight, the court of appeals correctly found that the Secretary "adequately justified his action in terms of the anticipated public reaction" (Pet. App. 16). For example, the Secretary explained that the negative public response to ignition interlock systems was not a reliable indicator of the probable public reaction to passive restraint systems, because the latter do not require affirmative passenger action (*id.* at 16, 51). Since the record demonstrates that the Secretary carefully evaluated public reaction (see also *id.* at 60-65, 69-70, 73-74; J.A. 176-181, 186-187, 226-227, 233-234, 245-248, 268-269), the court of appeals did not improperly speculate on matters not considered by the agency. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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